United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE AND JOINT APPENDIX

United States Court of Appeals

DISTRICT OF COLUMBIA

422

No. 9210

PLUMMER EPPS, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

EDWARD M. CURRAN
United States Attorney.
GRACE B. STILES,
Assistant United States Attorney.
SIDNEY S. SACHS,
Assistant United States Attorney.

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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9210

PLUMMER EPPS, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted and convicted for taking, using, operating, and removing a truck from a certain street in the District of Columbia on December 7, 1945, without the consent of the Blue Ridge Coal Company, the owner of the truck, and for feloniously and unlawfully operating and driving and causing to be operated and driven the truck for his own purposes (App. 11).

Counsel for appellant in his opening statement stated that the defense would show that the appellant was personally acquainted with Robert Owens, the Government's principal witness; that on the night of December 8, 1945, appellant went to a movie and after the movie saw the truck parked on the street; that he thought Owens would be nearby and he thought

he might get a ride home and so got in the truck and was sitting there when the officer approached him (App. 15–16).

The Vice President and General Manager of the Blue Ridge Coal Company testified that on December 8, 1945, he was advised that one of the trucks of his company, No. 43, driven by Robert Owens, had been stolen; that this particular truck was being purchased from the company by Owens at the time and he customarily took it home at night and parked it in front of his home (App. 16–20).

Robert Owens testified that he lived at 611 3rd Street SW.; that he had worked for the Blue Ridge Coal Company for eight or nine years as a truck driver; that he was purchasing the truck which he drove and customarily took it home every night. In addition he gave the following testimony on direct examination.

> Q. Mr. Owens, let me ask you this; do you customarily take this truck home with you at night?
>
> A. Yes, ma'm; every night.
>
> Q. And where do you park it?
>
> A. On a little vacant lot just where I live, up on that vacant lot on Third Street.
>
> Q. Now, directing your attention to December 7, 1945, did you take that truck home that night?
>
> A. Yes; I took that truck home that Friday night.
>
> Q. What did you do with it?
>
> A. I parked the truck and went across to the lunchroom and drank a cup of coffee, and went in the house and went to bed.
>
> Q. You parked it in the lot?
>
> A. Yes; right on the street by the lot.

He testified further that he had seen appellant on the night in question in the lunchroom and that he left him in the lunchroom sleeping in a chair; that he never gave appellant permission to drive the truck; that appellant could have seen the truck parked across the street from the lunchroom. The witness was cross-examined but no questions were asked with regard to where the truck had been parked on the night of December 7, 1945 (App. 20–23).

Officer Winter then testified that on December 8, 1945,

he saw appellant in a truck parked close to the intersection at 6th and N Sts. NW.; that his attention was first attracted to the truck because it was parked in violation of the parking regulations; that as he approached the truck he heard the starter whirling as if someone were attempting to start the motor; that he found appellant in the driver's seat operating the starter; that he found that the ignition wires had been disconnected and crossed so that a key was not required to start the motor; that appellant told him he had no driver's permit, registration card for the truck, draft card or any means of identifying himself; that appellant told him the truck was not his but that he was sitting, waiting; that appellant named the man who owned the truck and the man lived in SW. on 3rd St.; that he arranged to have appellant sent to the precinct in the patrol wagon and then returned to the truck which he started by stepping on the starter and drove to the precinct. The witness testified that appellant gave as a reason for being in the truck that he was just examining it, playing with it; that it was later discovered that the truck was owned by the Blue Ridge Coal Company (App. 23–26).

At this point the Government rested and motion was made for a directed verdict on the ground, among others, that the indictment stated the truck was removed from a street and the evidence showed it was removed from a vacant lot. The motion was overruled (App. 26).

Appellant testified in his own behalf, stating that he went to a movie on the evening of December 8, 1945, on 7th Street NW.; that he left the theater about 11:00 P. M. and walked up to N Street and recognized the truck parked there. He testified that he knew the driver of the truck, having seen him drive over at the Blue Ridge Coal Company, and that he felt that he must be somewhere around and so decided to wait. He got in the truck and sat on the right hand side about four or five minutes, and as he went to get out the officer came up and asked him what he was going to do with it. Appellant denied crossing the ignition wires (App. 27–29).

On cross-examination appellant testified that he was in a restaurant with Owens on the night of December 7; that he left the restaurant about 1:30, after Owens had left; that at times he had seen the truck parked on 3rd Street, but did not see it

that night; that after leaving the restaurant he went to 2215 Georgia Avenue NW. by streetcar. He testified further that he lived at 1704 14th St. NE.; that on Saturday, December 8, 1945, he had left his place of work at 12th and Maine Avenue SW. at 11:00 A. M.; that after leaving work he stood around on the corner and talked and then went to a poolroom and then to a theater at 7th and N Streets NW.; that he got to the theater about 6:30 and stayed until 11:00; that he stood up for three hours waiting to get a seat (App. 29–34).

At the conclusion of the testimony appellant again made a motion for a directed verdict but it was again overruled.

STATUTE

§22–2204, D. C. Code (1940):

UNAUTHORIZED USE OF VEHICLES

> Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment. (Feb. 3, 1913, 37 Stat. 656, ch. 23, §826b.)

SUMMARY OF ARGUMENT

I

There was no fatal variance between the indictment and the proof. The only reasonable interpretation to be given the testimony of the complaining witness was that the truck allegedly stolen had been parked by him on a street, as alleged in the indictment. Even conceding that there was some ambiguity in his testimony that the truck had been left on the street, there was no fatal variance because appellant was not prejudiced in his defense and because he could not now be subjected to another prosecution for the same offense.

II

There was ample evidence to warrant submission of the case to the jury and to support the conviction of appellant.

ARGUMENT

I

There was no fatal variance between the indictment and the proof

Appellant contends (Brief 7, 13) that the trial court erred in overruling his motions for a directed verdict, made at the conclusion of the Government's case and again at the close of all the evidence, on the ground of a variance between the allegation of the indictment and the proof offered by the Government as to the place from which the truck was removed. Appellant bases this contention on the theory that Robert Owens testified that the truck was left by him on a vacant lot. As previously noted, Robert Owens testified that he customarily took the truck home at night and parked it on a little vacant lot where he lived. Asked specifically if on the night of December 7, 1945, he had parked the truck on the lot, he said "Yes, right on the street by the lot" (App. 20).

It is submitted that the only meaning reasonably to be given the witness' testimony was that he parked the car on the street by the lot on the night of December 7, 1945. His use of the word "yes" was obviously no more than an introduction to his real answer and it certainly cannot be said to have outweighed the qualification which immediately followed it. Construing the testimony in this way, there can be no question of a variance between the indictment and the proof.

Even if it be conceded that the witness' testimony was not absolutely clear as to the place at which he parked the truck on the night in question, there was no fatal variance. The question "is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to

present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. * * * If, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless." *Berger* v. *United States,* 295 U. S. 78, 81 (1935). The allegation and proof in this case conformed adequately to these requirements.

There is no indication that appellant was prejudiced in the making of his defense or surprised by the alleged variance in the proof. The defense as revealed in the opening statement was that the appellant did not take the truck. The place from which it was taken had nothing to do with the defense. As a matter of fact, it is difficult to understand how the difference of a few feet which would have been involved if the truck had been parked on the lot and not on the street could have affected the defense. Furthermore, after the testimony in question had been given, appellant did not cross-examine the witness with regard to the place where he had parked the truck. Counsel for appellant did not argue to the jury the alleged variance, nor did he request that the Court give an instruction on the point. It appears conclusively therefore that appellant was not prejudiced in his defense and that his attempt to secure a reversal on this point is a labored attempt to take advantage of a nonexistent technicality.

Furthermore, appellant is not subject to a further prosecution for theft of the truck. The test generally applied to determine the validity of a plea of double jeopardy is whether the same evidence is required to sustain the two charges. *District of Columbia* v. *Buckley,* 75 U. S. App. D. C. 301, 128 F. (2d) 17, cert. denied 317 U. S. 658. If appellant were reindicted for the offense of taking a truck from the Blue Ridge Coal Company on December 7, 1945, the same evidence adduced at this trial would be relied upon. The record in this case would be available and it is inconceivable that any court would permit the trial of appellant on such a charge. Cf. *Bord* v. *United States,* 76 U. S. App. D. C. 205, 133 F. (2d) 313 (1942), cert. denied 317 U. S. 671; *Marx* v. *United States,* 96 F. (2d) 204 (C. C. A. 9, 1938); *Nordlinger* v. *United States,* 24 App.

D. C. 406, 70 L. R. A. 227 (1904); *United States* v. *Miner*, Fed. Case No. 15780 (Cir. Ct. S. D. N. Y., 1874).

II

The evidence was sufficient to warrant submission of the case to the jury and to support the conviction of appellant

Appellant contends (Brief 6, 20) that there was insufficient evidence to warrant submission of the case to the jury because (1) there was only a scintilla of evidence that the truck was parked on the street and because (2) the Government was bound by appellant's reasonable explanation of his presence in the stolen truck.

The evidence as to the parking of the truck on the street has been discussed. Appellant's explanation that he was sitting in the truck, playing with it, waiting for the driver to return, was not binding on the jury and it is submitted that there was ample evidence in the case to warrant appellant's conviction.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the Court below should be affirmed.

Respectfully submitted.

EDWARD M. CURRAN,
United States Attorney.
GRACE B. STILES,
Assistant United States Attorney.
SIDNEY S. SACHS,
Assistant United States Attorney.

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JOINT APPENDIX

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District Court of the United States for the District of Columbia

Holding a Criminal Term

October Term, A. D. 1945

District of Columbia, ss:

The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That one Plummer Epps, on, to wit, the seventh day of December 1945, and at the District of Columbia aforesaid, one certain automobile truck, of the property of the Blue Ridge Coal Co., Inc., a body corporate, then and there being, feloniously and unlawfully did take, use, operate, and remove, and did cause to be taken, used, operated, and removed, from a certain street, there situate, without the consent of the said Blue Ridge Coal Co., Inc., a body corporate, the owner thereof; and that the said Plummer Epps, the said automobile truck did then and there feloniously and unlawfully operate and drive, and cause to be operated and driven, for the profit, use, and purpose of him, the said Plummer Epps; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

EDWARD M. CURRAN,
Attorney of the United States
in and for the District of Columbia.

A true bill:

ALBERT V. LLUFRIO, *Foreman.*

Judgment and Commitment

District Court of the United States for the District of Columbia

No. 76101

United States

v.

Plummer Epps

Criminal Indictment in One Count for Unauthorized Use of Vehicle

On this 15th day of February A. D. 1946, came the United States Attorney, and the defendant Plummer Epps appearing in proper person, and by counsel, DeLong Harris, Esquire, and,

The defendant having been convicted on a verdict of guilty of the offense charged in the indictment in the above-entitled cause, to wit: Unauthorized Use of Vehicle, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Three (3) months to One (1) year and One (1) day.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) Bolitha J. Laws, *C. J.*,
United States District Judge.

In the District Court of the United States for the District of Columbia

Criminal No. 76101

UNITED STATES

v.

PLUMMER EPPS

MEMORANDUM

Defendant has filed a motion for a new trial claiming a fatal variance between indictment and proof. The charge of the indictment is unlawful removal of an auto truck of the Blue Ridge Coal Co. from a street, without consent of the owner (Vio. Sec. 826b D. C. Code). The evidence at the trial did not make it perfectly clear whether the removal was from a street or a lot.

Counsel for both sides recognize the principles which govern the Court in granting a motion for a new trial where a variance is claimed. The question to be determined is, first whether the defendant was prejudiced in making out his defense and, second, whether he will be protected against another prosecution for the same offense.

In this case I have had no trouble making up my mind that the defendant was not misled in respect of making his defense. The location of the truck, whether it was on the lot or on the street, had no controlling effect on his defense. With respect to his right to plead former jeopardy, I felt some concern until receipt of the record of the testimony from the court reporter. This record shows a witness testified that the automobile was "right on the street by the lot." This indicates that the automobile was left on the street, notwithstanding the witness made other answers consistent with the truck's having been left on a lot. I agree with counsel for the defendant that the record is not entirely clear as to where the car was left. However, I think it is certain that if the defendant should be prosecuted again for this same offense, the record of the indictment in this case and the testimony which was given before the Court would show beyond any doubt that the defendant had been tried for the offense. Since the charge is that the auto-

mobile was removed from a street and there is some evidence to that effect, vague though it may be, the Court would not permit a subsequent prosecution of an offense on the same date of taking an automobile of the Blue Ridge Coal Company from the street.

I, therefore, feel that the motion for a new trial must be overruled.

BOLITHA J. LAWS,
Chief Justice.

FEBRUARY 1, 1946.

§ 22–2204, D. C. Code (1940):

UNAUTHORIZED USE OF VEHICLES

> Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit use or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment. (Feb. 3, 1913, 37 Stat. 656, ch. 23, § 826b.)

In the District Court of the United States for the District of Columbia

Criminal Division No. 1

Criminal No. 76101

UNITED STATES, PLAINTIFF

v.

PLUMMER EPPS, DEFENDANT

WASHINGTON, D. C.,
Thursday, January 17, 1946.

The above-entitled case came on for trial and hearing at 10: 45 o'clock a. m., Thursday, January 17, 1946, in the Dis-

trict Court of the United States for the District of Columbia, in the courthouse in the city of Washington, D. C.

Before Honorable BOLITHA J. LAWS, Chief Justice of the District Court of the United States for the District of Columbia, and a jury.

* * * * *

PROCEEDINGS

* * * * *

OPENING STATEMENT ON BEHALF OF THE GOVERNMENT

Mrs. STILES. May it please the Court, and ladies and gentlemen of the jury, as His Honor has told you, the defendant in this case is charged with violation of a statute which prohibits the taking and using for his own use and purposes a motor vehicle belonging to someone else without that person's consent.

The indictment alleges this occurred on the 7th day of December 1945, in the District of Columbia. We will show that this motor vehicle was a truck belonging to the Blue Ridge Coal Company, and that it was driven ordinarily by a man named Robert Owens for the Company, and that it was the custom for Robert Owens to take this truck home with him at night and park it in front of his own house, and return it next morning; that on the night of December 7th Robert Owens took the truck and parked it as usual, and the next morning the truck was gone. He reported it to his employer and the employer reported it to the police, and that night, December 8th, the following night, Officer Winter saw this defendant in this truck trying to start it at a point some distance from where the driver Owens had parked it; that he examined the truck and found the ignition wires crossed; that he took the truck and drove it to the station house; that he questioned the defendant about it and the defendant denied taking the truck.

OPENING STATEMENT ON BEHALF OF THE DEFENDANT

* * * * *

Mr. HARRIS. May it please the Court, and ladies and gentlemen of the jury, I represent the defendant who is charged

with the unauthorized use of this motor vehicle, a truck, allegedly owned by the Blue Ridge Coal Company.

We expect to show you, among other things, the following:

First of all, the defendant sometime previously had been employed by the Blue Ridge Coal Company;

Secondly, that he was well acquainted with Robert Owens, who will be the Government's principal witness.

On the night of December 8th this defendant went first to the theater, and about 11:15 p. m. while walking on M Street between 6th and 7th, he saw this truck. As a matter of fact, the defendant Epps at one time worked with Owens on this very same truck.

He saw the truck and, knowing that Owens, who wasn't a very good friend but a casual acquaintenance, he had worked with him for a period of several years, but he was no longer employed by the Blue Ridge Coal Company; he saw the truck parked on M Street and, thinking that Robert Owens would be nearby, he got in the truck, and while sitting there it was there that the Officer approached him, and you will notice even from the actions and position of this man that he wasn't doing anything with the truck; this man denied ever taking the truck; there is no evidence other than the fact that he was sitting in the truck.

We will show you according to the evidence he was sitting there waiting for the driver Robert Owens, and he knew that he kept it somewhere down in Southwest by his place, and he knew where Robert Owens lived, and he thought he might be able to get a ride home, and go with Robert Owens.

* * * * *

Thereupon WALTER J. SHARPLEY was called as a witness for and on behalf of the Government and, being first duly sworn, was examined and testified as follows:

* * * * *

The WITNESS. Walter J. Sharpley.

Direct examination by Mrs. STILES:

Q. Mr. Sharpley, what office do you hold with the Blue Ridge Coal Company, if any?

A. Vice President and General Manager.

Q. And as Vice President of that company—is it a corporation, or is it not?

A. It is a corporation.

Q. As Vice President of that corporation are you familiar with its corporate seal?

A. I am.

Q. I show you what purports to be a facsimile of the corporate seal of that company and ask you recognize it [handing document to witness]?

A. Yes; that is it.

Mrs. STILES. You have no objection to this, have you?

Mr. HARRIS. No.

Mrs. STILES. I offer it in evidence, if your Honor please.

The COURT. It may be received.

Mrs. STILES. Government's exhibit No. 1.

(Thereupon the document, facsimile of the corporate seal, identified by the witness, was by the Court received in evidence as "Government's exhibit No. 1.")

By Mrs. STILES:

Q. Mr. Sharpley, do you know Robert Owens?

A. Yes, I do.

Q. Does he work for your company?

A. He does.

Q. In what capacity?

A. As a truck driver.

Q. And do you own a 1941 stake body truck?

A. We own several.

Q. Well, directing your attention to December 1945, did anything happen to anyone of your trucks?

A. Yes.

Q. When was this matter brought to your attention?

A. Saturday morning, after the car had been stolen.

Q. And was Saturday morning December 8th?

A. That's right.

Q. Now, this Robert Owen, you stated, was a truck driver for your company?

A. Yes.

Q. And may I ask whether he was driving this particular truck at this time?

A. He was.

Q. And what was the custom as to what he did with the truck at night when he finished his work?

A. Well, he is purchasing the truck from us, and he generally takes it home at night unless it is broken down, or something, and parks it in front of his home at night.

Q. What do you mean he is purchasing the truck from you?

A. He is buying the truck from us.

Q. You mean on the installment plan?

A. Yes.

Q. He took the truck home and took care of it at night; is that right?

A. Yes.

* * * * *

Q. Now, what kind of a truck was it? Can you describe it in any way?

A. Well, we have numbers on our trucks, and this was No. 43.

Q. And what kind of a truck is it?

A. It is a stake body truck.

Q. What year was it?

A. I couldn't tell you right off-hand, we have so many of them.

Q. Now, did there come a time when you saw this truck again?

A. Yes.

Q. And when was that, Mr. Sharpley?

A. Well, I see them each day and I am very familiar with each one of the trucks, and with the men driving them, and the likes of that, and Monday morning I got a call and I went over to the precinct, I think it is 13, and identified the truck as No. 43 that Robert Owens was driving and purchasing.

Q. And may I ask you this question: Do you know the defendant in this case, Plummer Epps?

A. Yes, I do.

Q. Has he ever worked for your company?

A. He has worked as a helper on trucks there.

Q. Was he working for your company at this time?

A. He was not.

Q. In what capacity, when he did work for you, did he work, Mr. Sharpley?

A. He was a helper on one of the trucks.

Q. Did he at any time help, or would you know, this driver Owens?

A. I don't know for sure.

Mrs. STILES. You may cross-examine.

Cross-examination by Mr. HARRIS:

Q. Mr. Sharpley, who owned this truck?

A. The Blue Ridge Coal Company, Incorporated.

Q. You say Robert Owens was purchasing the truck?

A. He was purchasing the truck.

Q. Are you familiar with the type of agreement he was purchasing it under?

A. No; we have a type of agreement.

Q. What type agreement is it?

A. I couldn't tell you exactly; it is handled through our Baltimore office.

Q. Are you at liberty, as a matter of fact, to state whether your company owns the truck?

A. Yes, we own it.

Q. Well, then, just how is it that Robert Owens is purchasing it?

A. He is purchasing it by paying so much a month on it like anybody else would. We hold the title.

Q. You hold the bare legal title?

A. We hold the title until it is paid for.

Q. Do you know how long, or how much Robert Owens has paid on this truck?

A. I don't know exactly.

Q. Would you say he had paid off half?

A. I wouldn't like to say because I don't handle that part of it.

Q. Do you know how long Robert Owens has been working for the company?

A. For years.

Q. For years; do you know when it was he began purchasing this truck?

A. No, I couldn't state.

* * * * *

Thereupon ROBERT OWENS, a witness called on behalf of the Government, being first duly sworn by the Clerk of the Court, was examined and testified as follows:

* * * * *

The WITNESS. Robert Owens.

DIRECT EXAMINATION

Q. Now, who do you work for?

A. Blue Ridge Coal Company.

Q. How long have you been working for them?

A. Right around eight or nine years.

Q. Eight or nine years?

A. Yes.

Q. What do you do for them?

A. Drive a truck.

Q. Drive a coal truck?

A. Yes, ma'm.

Q. And are you buying that truck from the company?

A. Yes.

Q. Mr. Owens, let me ask you this; do you customarily take this truck home with you at night?

A. Yes, ma'm; every night.

Q. And where do you park it?

A. On a little vacant lot just where I live, up on that vacant lot on Third Street.

Q. Now, directing your attention to December 7, 1945, did you take that truck home that night?

A. Yes; I took that truck home that Friday night.

Q. What did you do with it?

A. I parked the truck and went across to the lunch room and drank a cup of coffee, and went in the house and went to bed.

Q. You parked it in the lot?

A. Yes; right on the street by the lot.

Q. Do you know what time it was?

A. It was after dark; before midnight.

Q. When did you next look for the truck?

A. The next morning when I got up to go to work, Saturday morning.

Q. Was the truck there?

A. No, ma'm; it was gone.

Q. Did you give anybody permission to use your truck?

A. No, ma'm. I had the keys in my pocket.

Q. You had the keys in your pocket?

A. Yes.

* * * * *

Q. Do you know the defendant, Plummer Epps?

A. Yes, I seen him one time; he used to work over there.

Q. Did he work with you on your truck?

A. No; he never did work with me. He did work with other drivers.

* * * * *

Q. Had you seen Plummer Epps on this day, December 7th?

A. I seen him that night when I was in the lunchroom drinking a cup of coffee.

Q. Did he come out with you?

A. No, ma'm; I left him in there sitting down in a chair asleep.

Q. Did he know, as far as you know, where you parked your truck?

A. Well, when I come out the lunchroom I was on the right and the truck would be on the left, right across from the lunchroom.

Q. Right across from the lunchroom. Did you ever at any time give this defendant permission to drive that truck?

A. No, ma'm. During the time when he was working over there I wasn't buying it.

* * * * *

Q. But any time after that had you ever given him permission to use that truck?

A. No, ma'm.

* * * * *

Cross-examination by Mr. HARRIS:

Q. Mr. Owens, when was it you first met Epps, the defendant?

A. How is that?

Q. When was it that you first met Epps? When did you first see Epps? How long have you been knowing him, do you recall?

A. I can't recall exactly, but I guess it has been about a year or two years, something like that.

Q. A year or two years. Would you say it was more than a year or two?

A. It might have been. I can't recall exactly when I first met him.

Q. But you knew his name at that time?

A. All I knew was Epps, I didn't know the Plummer part.

Q. You did know Epps?

A. I knew the name by Epps.

Q. Several years ago?

A. It has been over a year ago.

Q. How well did you know him?

A. How?

Q. How well did you know him?

A. Just knew him from being over there working, that is all.

Q. Do you know how long Epps worked for the Company while you were working there?

A. I don't know exactly how long he worked there, but I know he worked around a year or two years, something like that, anyhow.

Q. Now, when was that?

A. I know he worked there year before last, and probably the year before that.

Q. Was that 1944 or 1945?

A. I think it was 1943 or '4, somewhere along in there. I can't recall exactly when he worked there. There is a lot of fellows working there and we don't keep up with them.

Q. But you believe he did work there in 1943 and '44; is that correct?

A. I wouldn't say definitely, but I know he did work there.

* * * * *

Q. You mentioned seeing Epps in the lunchroom the night before this unauthorized use; had you ever seen him in there before?

A. I don't know when I ever saw him in the lunchroom before.

Q. Did you ever see him any place other than the lunchroom?

A. If I was passing by the market he would holler and throw up his hand, something like that.

Q. And did you throw up your hand and holler back at him?

A. Do you mean at the time he was working down there?

Q. No; any time?

A. Sure; we speak to each other.

* * * * *

Q. How long have you been buying this truck?

A. Started last year, 1945.

Q. Started buying it in 1945?

A. Yes.

Q. What month?

A. What month? I don't remember exactly what month, but it was along in the Spring.

* * * * *

Q. How much did you pay on this truck?

A. How much did I pay on this truck?

Q. Yes; per month or per week?

A. I pay per month.

Q. How much?

A. Around $175 I pay.

Q. I didn't understand you.

A. $175.

Q. A month?

A. Yes, sir.

* * * * *

Q. Would you say this truck would be yours in one or two months from now?

A. Perhaps.

Q. Do you have your book? Do you have any method of keeping account?

A. The receipts.

Q. And do you remember the exact amount you are paying for this truck?

A. $980.

Q. $980; in other words, you should complete paying for this truck in about five or six payments; is that correct?

A. Something like that.

* * * * *

Thereupon EARNEST HENRY WINTER was called as a witness on behalf of the United States and, being first duly sworn, was examined and testified as follows:

The WITNESS. Earnest Henry Winter.

Direct examination by Mrs. STILES:

Q. Officer Winter, you are attached to No. 2 Precinct of the Metropolitan Police Force; is that right?

A. Yes, m'am; I am temporarily assigned to the Detective Bureau, but assigned to No. 2.

* * * * *

Q. Officer, directing your attention to December 8, 1945, did you see the defendant on that date?

A. Yes, I did.

Q. And where did you see him; what part of the City?

A. At the northwest corner of 6th and N on N Street, in a truck parked very close to the intersection.

Q. Was that N Street, Northwest?

A. N, Northwest.

Q. And what kind of a truck was this, Officer?

A. It was a stake body, I believe it was a G. M. C. truck. I am not sure of that. It might have been a Dodge or General Motors.

Q. What, if anything, was this defendant doing at the time you saw him in this truck?

A. My attention was first attracted to the truck as it was parked in violation of parking regulations. I went over to the truck, and as I approached it I heard the starter whirling the motor over as if someone were attempting to start the motor, and this continued while I walked some distance toward the truck.

When I arrived there the defendant, Plummer Epps, was sitting in the driver's seat and he was operating the starter, turn-

ing the motor over by the strength of the battery for the means of starting it.

Q. Did he have any keys in the ignition, Officer?

A. No, ma'm; I found that the wires, the two wires going to the ignition and lock had been taken off, or pulled from the lock, and were crossed by twisting them together. He didn't need a key.

Q. Now, did you have any conversation with the defendant, ask him anything about why he was there?

A. Yes, I did.

Q. What was that conversation?

A. I first asked him for his driver's permit. He told me he didn't have any. I asked him for the registration card for the truck. He told me he didn't have any. I asked him if he had any means of identifying himself, a draft card, or any papers, or any means at all by which he could identify himself. He told me no. I asked him if the truck was his. He told me no. I asked him what he was doing with it. He told me he was sitting waiting, that he knew the man who owned the truck, that the man lived in Southwest. He did not give me an address, but he told me on 3rd Street.

I asked him where his home adress was, where he lived. He told me he lived in the 1700 block of 14th Street, Northeast. I asked him if that was in the new project over there. He told me it was.

I took him from there to the box about a half a block away at 6th and N Streets, and sent him in to the Precinct in the wagon, and went back to the truck and got in it and looked over the truck on the inside by means of my flashlight; stepped on the starter and the motor started, and so I drove the truck into the Precinct, and found it had been reported stolen the day previous or early that morning. It had been stolen sometime that night, and I asked him about that. He told me he did not steal the truck.

I asked him what he was going to do with it that night and he told me nothing. I asked him where he was going, where he was going ultimately that evening, when I got him, and he told me he was going home, and I asked him again what his

reason was for being in the truck. He was just examining it, playing with it, and he knew; he still maintained that he knew the owner of the truck, though he didn't know his name, and he told me he lived some place on 3d Street, Southwest. I believe he told me 3d and N, I am not sure, Southwest.

Q. And did you find out to whom the truck belonged, Officer?

A. Yes, mam.

Q. To whom did it belong?

A. We found that it was owned by the Blue Ridge Coal Co., and we notified the gentleman, or rather I notified the gentleman there by 'phone, who in turn sent Mr. Sharpley over to the Precinct. Mr. Sharpley on Monday morning identified the truck, and we came down to court.

* * * * *

Mrs. Stiles. That is the Government's case, if your Honor please.

Mr. Harris. May we approach the Bench?

The Court. Yes.

(Thereupon, counsel approached the Court's Bench and, out of the hearing of the jury, the following occurred:)

Mr. Harris. If your Honor please, I want to move for a directed verdict on the ground that they have failed to prove ownership, and also that the indictment says the truck was removed from a street and the evidence shows it was removed from a vacant lot, if it was removed. The man testified once he parked his truck in a vacant lot. Do you recall that?

Mrs. Stiles. He said he had it parked in a vacant lot next to his house.

Mr. Harris. And we have a case right on that same point, where it was parked in an alley and was proved to have been taken from a vacant lot.

The Court. I don't think there is anything about the question of ownership, and on the other point, if he is convicted, I will consider that on a motion for a new trial. There isn't any testimony that it was removed from the street; is that right?

Mr. Harris. There is positive evidence that it wasn't.

The Court. There isn't any evidence that he started it on the street?

Mr. HARRIS. The car was never in motion.

The COURT. I will have to overrule the motion, and I will consider it on the motion for a new trial. I don't know how important a variance that is.

Mr. HARRIS. On the question of ownership?

The COURT. I think he has got a prima facie case of ownership. As I told you a moment ago, I think the point of variance is a more serious point. You say there is a case on it?

Mr. HARRIS. I am quite sure there is.

The COURT. You may look it up later on. Overruled.

* * * * *

Thereupon PLUMMER EPPS, the defendant herein, was called as a witness in his own behalf and, being first duly sworn, was examined and testified as follows:

* * * * *

The WITNESS. Plummer Epps.

DIRECT EXAMINATION

Q. Do you recall the night of December 8, 1945?

A. I do.

Q. Will you tell the ladies and gentlemen of the jury what happened in the early part of the evening, and later that night?

A. In the evening of December 8, 1945, I went to the show.

Q. What show did you go to?

A. The Gem Theater.

Q. Whereabouts?

A. In Northwest on 7th Street, and I stayed to about 11:00 o'clock, and walked up to N Street and turned on N Street.

Q. What time was this?

A. I left the theater about 11:00 o'clock and walked right up two blocks. I was taking my time, I guess about seven or eight minutes. I walked on up to N Street and recognized this truck sitting there.

Q. What kind of a truck was it?

A. It was a 1940 truck. I knowed the truck, and went over and looked in the truck, and the boy that was supposed to be driving the truck weren't there, and I thought he might be around there some place.

Q. Did you know the driver of the truck?

A. Yes, sir; I know the driver of the truck.

Q. How long have you known him?

A. I know him by his name about four or five years.

Q. Did you ever work with him?

A. I never worked with him, but I saw him driving the truck over at the Blue Ridge.

Q. What did you do next?

A. I said to myself, "He must be somewhere around," so I said to myself I would wait, and got in the truck and sat in the truck on the right hand side about four or five minutes, and as soon as I went to get out of the truck the Officer came up and asked me what I was going to do with it, and I said, "Nothing." So he asked me was I trying to start it and I said no, I wasn't trying to start it; and he said was I driving the truck and I said no, I wasn't driving the truck, and then he took me and searched me, and took me to the box and locked me up.

Q. When was the last time you saw Robert Owens?

A. I saw him the night before.

Q. With respect to December 8th, was that one day or two days before?

A. One day before.

Q. And did you speak to him?

A. Yes.

Q. Where did you speak to him?

A. At 3rd and D, Southwest, in a lunchroom.

Q. Did Owens know you?

A. He knowed me by seeing me.

Q. Now, did you at any time have this truck in motion?

A. No, sir.

Q. Now on December 7th—December 7th did you see this truck anywhere?

A. I saw it on the 8th.

Q. On the 8th?

A. Yes.

Q. And that was on N Street?

A. No, sir; this was on 3rd Street.

Q. No; on the 8th of December?

A. Yes.

Q. You didn't move it, did you?

A. No.

Q. How long did you stay in this truck on the night of December 8th?

A. I don't know; five or six minutes.

Q. Five or six minutes. Now, do you recall what time that was?

A. On the 8th?

Q. On the 8th?

A. It couldn't have been no later than 15 minutes after 11:00.

Q. Now, the Officer mentioned the ignition wires were crossed. Did you cross any ignition wires on this truck?

A. No, sir.

Q. Did you know that the truck had been reported stolen?

A. No, sir.

Q. How long ago was it that you worked for the Blue Ridge?

A. I worked there some in 1934, and I worked there the Winter of 1940, and I worked there some in 1943.

Q. Now, in what capacity were you employed? What did you do when you were working there?

A. I was helper on the truck.

Q. Helper on the truck. Did your duties at any time involve driving the truck?

A. No, sir.

Q. Can you drive a truck?

A. No.

Q. Can you drive any motor vehicle? Have you a permit to drive?

A. No.

Q. Have you ever had a permit to drive?

A. No, sir.

* * * * *

Cross-examination by Mrs. Stiles:

Q. Now, you say you were in the restaurant with Owens that night; Saturday night the 7th?

A. I was in there getting a cup of coffee and I seen him in there. I weren't with him.

Q. I mean you were in there at the time he was in there?

A. Yes.

Q. And you were in there when he went out, weren't you?

A. Yes.

Q. And when did you leave the restaurant?

A. I left the restaurant around about, I think it was about 1:30.

Q. And where did you go when you left the restaurant?

A. I went to 2215 Georgia Avenue, Northwest.

Q. How did you get there?

A. I got the streetcar. I walks right down G Street and got the bus and transferred at 7th Street.

Q. Had you been in the restaurant before?

A. Yes, ma'm.

Q. Many times?

A. Yes, ma'm.

Q. And you knew where Owen parked his car every night, didn't you?

A. No; I didn't know where he parked it every night, but I have seen it parked up there on 3rd Street.

Q. And when you came out of there that night at 1:30, did you see the truck then?

A. No; I didn't pay any attention to it then, what he was doing then.

Q. You didn't get in this truck and drive it over on Georgia Avenue?

A. No, ma'm.

Q. Now, you say that you went to the movies on Saturday night, the 8th?

A. Yes, ma'm.

Q. That was near where this truck was parked on N Street; is that right?

A. Yes.

Q. Where do you live?

A. I live 1704 14th Street, Northeast.

Q. Northeast?

A. Yes.

Q. And where was this movie you went to?

A. 7th and N Northwest.

Q. How did you happen to go to a movie that far from your home that night?

A. That is the closest theater outside of 7th and Florida Avenue.

Q. How did you get to the movies that night from where you live?

A. From where I live? I had been working that day, and I come up from work and stopped at the theater.

Q. Where had you been working?

A. At 12th and Maine, Southwest.

Q. At 12th and Maine, Southwest?

A. Yes.

Q. And you went from your work to the movies?

A. No, ma'm; I shot some pool. I went in the poolroom, and went from there to the theater.

Q. Now, you had been working over in Southwest?

A. Yes.

Q. And then you went over to this movie in Northwest?

A. Yes.

Q. How far was this movie you went to from where you worked that day?

A. It was a good ways.

Q. Is that the nearest movie to where you work?

A. No, ma'm; it wasn't the nearest, but I was getting on up town closer to home all the time.

* * * * *

Q. You didn't take this truck the night before and drive it down to your work that day and then over to the movies that night?

A. No, ma'm.

Q. Now, you say you have never had a driver's permit?

A. No, ma'm.

Q. And can't drive a car?

A. No.

Q. And never have driven in this car without a permit?

A. No, ma'm.

Q. What time did you get off from your work that day?

A. Around about 11:00 o'clock.

Q. 11:00 o'clock at night?

A. In the morning.

Q. And this was Saturday?

A. Yes.

Q. And you quit work at 11:00 o'clock on Saturday?

A. Yes.

Q. And then you shot some pool?

A. Yes, ma'm.

Q. Then went to the movies?

A. Yes, ma'm.

Q. Is that all you did from the time you got off work?

A. I didn't come straight on up town. When I get off we stand around on the corner and talk, and then I went to the poolroom and then the theater.

Q. So after you got off at 11:00 o'clock all you did was stand around and talk, and play some pool, and went to the movie that night?

A. Yes.

Q. What time did you get to the movie that evening?

A. About 6:30.

Q. And stayed there until 11:00 o'clock?

A. Yes, ma'm.

Q. How many shows did you see?

A. There is a whole lot of shows from 6 to 11.

Q. Do you mean you say the same picture three times?

A. No, ma'm; there is three pictures playing, and there is usually a crowd and you stand up until you get a seat.

Q. What time did you go in?

A. I went in at 6 o'clock, but it was so crowded you couldn't see, and I waited until I got a seat. I stood up until I got a seat.

Q. You mean you stood up until you got a seat?

A. Yes, ma'm.

Q. When was that?

A. Nine o'clock.

Q. So for three hours you were waiting to get a seat in the theater?

A. Yes, ma'm.

Q. Now, you said when you got in this truck on the night of the 8th that you sat on the right hand side?

A. Yes.

Q. You heard the Officer say that you were sitting behind the wheel?

A. I weren't behind the wheel.

Q. Do you deny that we were not behind the wheel?

A. Sure; I say I weren't behind the wheel.

Mr. HARRIS. There is no testimony that he was sitting behind the wheel.

Mrs. STILES. Your Honor, I understand counsel objects to my saying that he was sitting behind the wheel. It is my recollection he did so testify.

The COURT. That is for the jury to determine.

By Mrs. STILES:

Q. You heard him say you were trying to start this truck when he came up there?

A. Yes; I heard him say it.

Q. And you deny that?

Q. And you deny that you were sitting behind the wheel at all?

A. Yes, ma'm.

Q. You say you sat there for four or five minutes?

A. Yes.

Q. What were you doing all that time?

A. I knowed that he was the driver, and I thought he would be coming along in four or five minutes.

Q. Why didn't you wait more than four or five minutes?

A. I was getting out, and that is when the Officer came up.

Q. You mean that when you saw the Officer coming up you started to get out?

A. No; I didn't see him. He must have seen me first, come from over on the 6th Street side, and asked me what I was doing with the truck and I told him I wasn't doing anything with the truck.

Q. Are you the same Plummer Epps that was convicted of petty larceny in May 1940?

A. Yes, ma'm.

Q. And the same one who was convicted of carrying concealed weapons in July 1938?

A. Yes.

Q. And the same one who was again convicted of carrying concealed weapons in May of 1941?

A. Yes, ma'm.

Q. And the same one who was convicted of petty larceny in May 1945?

A. Yes, ma'm.

Mrs. STILES. That is all.

Redirect examination by Mr. HARRIS:

Q. Concerning this theater, how large a theater is the Gem Theater?

A. It ain't so large; it is a small theater.

Q. What is the price of admission to this theater?

A. Twenty-five cents.

Q. Twenty-five cents; is that higher or cheaper than you can get in any other theater that you know of?

A. That is just as cheap.

Q. Just as cheap. Now, when you say that there were three pictures do you mean that there were three different pictures?

A. Yes.

Q. And were they running continuously one behind the other?

A. Yes.

Q. How long would it take to see all three pictures, would you say?

A. You can go to the Gem any day and it would take a good three hours, or over three hours, to see all three pictures.

* * * * *

Q. You say you left the theater about 11 o'clock?

A. Yes.

Q. And you went in there about six?

A. Yes.

Q. So you were in the theater about five hours, and during that time how many movies did you see?

A. I seen three.

Q. And those were different movies?

A. Yes.

* * * * *

ROBERT OWENS

Direct examination by Mrs. STILES:

Q. Mr. Owens, I understood you on direct examination to testify that the defendant had never been a helper on your truck. The defendant has testified he was a helper on your truck. Is that correct?

A. No, ma'm; he never has helped on my truck. He rode on the truck.

Mr. HARRIS. Just a minute, the defendant never admitted that he was a helper on the truck.

The COURT. I think you have covered that.

* * * * *

Mrs. STILES. If the Court please, that is the Government's case.

Mr. HARRIS. If the Court please, for the record I would like to renew my motion on those two grounds.

The COURT. Overruled.

Mr. HARRIS. Exception.

* * * * *

COURT'S CHARGE TO JURY

LAWS, C. J. Members of the jury, the question for you to determine in this case is whether this defendant, Plummer Epps, for his own use or benefit, did attempt to use, to operate and remove an automobile truck belonging to the Blue Ridge Coal Company, a corporation, without the consent of the owner of the truck.

You have heard the different versions of the case by counsel, and it is for you, on the evidence, to decide which version is correct.

In this case, as in every criminal case, the burden of proof is on the Government. The defendant is presumed to be innocent until his guilt is established to your satisfaction beyond a reasonable doubt.

A reasonable doubt is one which fits in with reason. It is a doubt that stays with you after you have analyzed the testimony, and if you find yourself, after analyzing it, still hesitant about the fact, if you have that kind of doubt in

this case it would be your duty to return a verdict of not guilty. If you have no such doubt then it would be your duty to return a verdict of guilty.

Any crime which involves the wrongful taking and carrying away of property belonging to another, if it eventuates that it was found in the possession of the defendant shortly after the taking of the property, without any reasonable explanation being given by the defendant, the jury may draw the inference of legal guilt. In this particular case the prosecution maintains that there was recent possession of this property which had been unlawfully taken, the position being that the defendant, when found, was found sitting in the car; that his explanation was not reasonable, or was not the type which you could believe and, therefore, you have the right from that situation to infer guilt.

The defendant, on the other hand, maintains that he gave a reasonable explanation for his presence, and that the explanation which he gave the police is the same one which he has given you. He maintains he was sitting in the car at the time waiting for the man who customarily drove it; that he, the defendant, had not taken the property from off the street to this particular place, had not operated it for his own purpose in any wise, and that therefore he is not guilty of a wrongful act, and particularly is not guilty of the particular act which is charged against him here.

You are the ones to decide that question, and without any influence of the Court except so far as the law is concerned. The Court controls the questions or matters of law, and you control the matters of fact.

When the defendant was on the witness stand the prosecuting attorney brought out the fact that he had a previous record; I think there is some larcency in which he had been involved, and some concealed-weapon charges in which he had been involved. That is not evidence of his guilt in the present case. It is only admissible in evidence in order that the jury might determine whether you think those convictions tended to affect the credibility of the defendant as a witness. If the fact that he has a previous record indicates to you that he did

not tell the truth on the witness stand today, of course, if you doubt his word, you have the right to give it that weight. If, on the other hand, you find that those previous convictions do not have any relation to whether he is telling the truth on the witness stand, or not, then you will disregard them.

Do you think of anything further, Mrs. Stiles?

Mrs. STILES. No, your Honor.

The COURT. Do you, Mr. Harris.

Mr. HARRIS. May I approach the Bench?

The COURT. Yes.

(Thereupon, counsel approached the Court's Bench and, out of the hearing of the jury, the following occurred:)

Mr. HARRIS. On the question of the statute about use or operating, I noticed you mentioned it; could your Honor elaborate a bit on the word "operate" or "use"?

The COURT. Yes, sir.

Mr. HARRIS. Because you understand our theory being, of course, that he did not operate or use.

Mrs. STILES. It is in the alternative; use or operate.

The COURT. Yes; use or for his own purpose. I have already told them that, but I can say it again if you think there is any doubt about it.

Mr. HARRIS. I listened to it and thought perhaps the word "operate" should come in a little more prominently, because on this particular state of facts he was unquestionably found in the car.

The COURT. All right.

Mrs. STILES. I do not think it has to be shown, however, that he was operating the car, or moving it.

The COURT. The fact of his sitting there wouldn't make any difference.

Mrs. STILES. But if he was trying to start it.

The COURT. I don't think that is the kind of use that is given; it would probably be an attempt. I do not think that is the type. I believe it is the use of the car for his own benefit, for his own purpose. I think there has to be some kind of appropriation to his use. The fact that he was on it, I do not believe that would be use of it until he did something with it. I think use involves operating the car.

Mrs. STILES. In other words, that he took it the night before and operated it?

The COURT. Yes.

(Thereupon, counsel returned to the trial table and, in the hearing of the jury the following occurred:)

The COURT. Members of the jury, unless you found the defendant removed or operated the truck he would not be guilty in this case. The theory of the Government is that he moved it from, I think the testimony was either off the street or a lot where it was parked the night before. That would be the theory of the Government. The mere fact that he was sitting in the car on the evening he was found, even if he put his foot on the starter but did not move it, that would not be sufficient to make out a case of guilt. The statute itself denounces the taking, or using, or operating, or removing of it, and unless you found that there was some movement of the car for the benefit or purpose, any purpose, of the defendant, he would not be guilty. The issue you really have in this case is more particularly what happened by way of the removing of the car before the time when he was found in the car than what happened when he was in there. The prosecution maintains that these wires were crossed in there and that he was working on the starter, and the fact that he was getting out of the car when the police came up would indicate that he had moved it before. On the other hand, he gave testimony which would tend to indicate that he had come to the car then for the first time, and that he did not have any connection with it any time before.

You may take the case, select your Foreman, and try to arrive at a unanimous verdict.

* * * * *

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

January Term, 1946

No. 9210

United States Court of Appeals
for the District of Columbia
FILED APR 4 - 1946
Joseph W. Stewart
CLERK

Plummer Epps

Appellant

versus

United States of America

Appellee

XXX

Appeal from a Judgement of the District Court of The United States for the District of Columbia

XXX

BRIEF FOR APPELLANT

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

January Term, 1946

No. 9210

Plummer Epps

Appellant

versus

United States of America

Appellee

Appeal from a Judgement of the District Court of The United States for the District of Columbia

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BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal from a final judgement of the District Court of the United States for the District of Columbia entered upon a verdict of a jury convicting appellant herein, Plummer Epps of a violation of Title 22, Section 2204 of the District of Columbia Code (1940) 37 Stat. 656, ch. 23, par. 826 (b).

The jurisdiction of the District Court of the United States for the District of Columbia to try appellant was based upon Title 11, Sections 301, 305, 306 and 322 District of Columbia Code (1940).

Jurisdiction of this Court on appeal is derived from Title 17, Section 101 District of Columbia Code (1940).

Statute Involved

Title 22, Section 2204 District of Columbia Code (1940) 37 Stat. 656, ch. 23, par, 826 (b). (Unauthorized use of a motor vehicle)

Statement of the Case

Appellant was tried below in the District Court of the United States for the District of Columbia for a violation of Title 22, Section 2204 District of Columbia Code (1940) 37 Stat. 656, ch. 23, par. 826 (b) under an indictment alleging that appellant, "on, to wit, the seventh day of December, 1945, and at the District of Columbia aforesaid, one certain automobile truck, of the property of the Blue Ridge Coal Co., Inc., a body corporate, then and there being, feloniously and unlawfully did take, use, operate, and remove, and did cause to be taken, used, operated, and removed, from a certain street, there situate, without the consent of the said Blue Ridge Coal Co., Inc., a body corporate, the owner thereof; and that the said Plummer Epps, the said automobile truck did then and there feloniously and unlawfully operate and drive, and cause to be operated and driven, for the profit, use, and purpose of him, the said Plummer Epps; against the form of the statute in such cases made and provided, and against the peace and government of the said United States."

At the trial below, as its first witness, the United States produced Walter J. Sharpley who testified (App. page 16) that witness was president of the Blue Ridge Coal Co., a corporation; that witness know one, Robert Owens who worked for the Company as coal truck driver; that the Company owned

several 1941 stake body trucks; that in December, 1945 it came to his attention that one of the trucks had been stolen; he reported the theft; that the truck was "number 43"; that he could not otherwise describe the truck; that Robert Owens was purchasing said truck from the company under some agreement which he could not describe; that Robert Owens took said truck with him each night to his home; that he knew appellant; that witness did not know how much Robert Owens had paid towards the purchase price of the truck; that at one time appellant worked for the company.

The second witness for the government, Robert Owens testified that he took the said truck home with him each night; that every night he parked it on a little vacant lot near his home; that on the night of December 7, 1945 he took the truck home with him and parked it; (App. page 20). To the direct question by the prosecutor, "You parked it in the lot?", the witness answered, "Yes, right on the street by the lot." The witness Robert Owens further testified that he knew appellant; that when they met they greeted each other; that witness was purchasing the said truck from the Blue Ridge Coal Co.; that he made payments of $175.00 per month on a purchase price of $980.00; that witness did not know how much he had paid towards the purchase price; that perhaps in one or two more installments the said truck would belong to witness; that on December 7, 1945, he saw appellant asleep in a lunch room; that the lunch room was near the place where he parked the said truck.

The third and last witness for the United States, Earnest H. Winters testified that on December 8, 1945 he saw appellant sitting in a truck near the intersection of 6th and N Streets, N.W.; that the truck was improperly parked in that it was too near the intersection; that as he approached the truck he heard the starter whirling; that appellant told witness that appellant was sitting in the truck waiting for the driver, whom

he knew; that appellant said that appellant believed that the driver, Robert Owens would be nearby; that appellant said that he had just attended a movie; that he was on his way home and stated where he lived; that appellant told witness that he had not driven or stolen the truck; that witness arrested appellant; that witness thereafter discovered that the truck had been reported stolen.

For the defense, appellant, Plummer Epps was the only witness. Appellant testified as to his whereabouts and all of his movements on December 7th and 8th, 1945; that when found sitting in the truck by the officer he had a few minutes before come out of a theater about one block away from the truck; that he knew the driver of the truck, Robert Owens; that appellant was at the time of first seeing said truck on his way home; that appellant believed that Robert Owens would be nearby and therefore decided to wait for Robert Owens; that while waiting, he idly played with the starter; that he had not removed or driven said truck; that he did not know how to drive; that he had no driver's permit.

At the close of the government's case defense counsel moved for a directed verdict. (App. page 26) on the ground of variance between allegation of the indictment and the proof adduced by the government as to the place from which the vehicle had been removed. The motion was overruled.

Defendant renewed his motion for a directed verdict on the ground of variance at the close of all the evidence. The motion being overruled, defendant preserved an exception to the Court's ruling. (App. page 35) Appellant was found guilty by the jury.

Thereafter defendant moved for a new trial; the motion was heard on oral argument and upon memoranda submitted by counsel for the parties. The motion for a new trial was overruled.

STATEMENT OF POINTS (Assignments of Error)

1.

The learned Court below erred in overruling appellant's motion for a directed verdict at the close of the government's case on the ground of variance between allegation of the indictment and the government's proof as to the place from which the vehicle had been removed.

2.

The learned Court below erred in overruling appellant's motion for a directed verdict at the close of all the evidence on the ground of variance; the indictment alleging a removal of the vehicle from a certain street and the proof showing a removal from a certain vacant lot.

3.

It was error for the Trial Court to submit to the jury the question as to the place from which the vehicle was removed when there was not sufficient evidence of a removal from a street to make it a question suitable for jury determination.

4.

The verdict was contrary to the evidence

SUMMARY OF ARGUMENT

1. The Trial Court below committed error in overruling appellant's motion for a directed verdict at the close of the government's case on the ground of variance between the indictment which alleged a removal of a truck from a street and the proof which did not establish a removal from a street but showed a removal of the truck from a vacant lot. The variance was material. The variance was prejudicial in that appellant was surprised.

2. At the close of all the evidence the Trial Court below erred in its denial of appellant's motion for a directed verdict on the ground of variance between indictment and proof. The indictment alleged a removal of a truck from a street while the proof showed a removal from a vacant lot. The statute, Title 22, Section 2204, D.C. Code (1940) defines as crimes the unauthorized removals of vehicles from eleven specified places; removals from

places other than those designated in the statute are not crimes. The place from which the vehicle is removed is material and in this case was part of the corpus delicti. It was necessary for the government to give clear and convincing proof of the place from which the vehicle was removed.

Appellant's conviction in this case under an indictment alleging an unauthorized removal of a truck from a street will not be a bar to a second indictment charging an unauthorized removal of the same truck from a vacant lot even though at the first trial evidence of a removal from a vacant lot was introduced in support of a charge of a removal from a street. Appellant is prejudiced in that his present conviction will not allow him to plead former jeopardy to a second indictment charging the same unauthorized removal.

3. The proof offered by the government failed to show a removal of the vehicle from a street as alleged in the indictment. This was part of the corpus delicti and part of the substance of the crime. There was no proved fact upon which the jury might infer guilt as to a removal from a street as charged.

4. The evidence showed a removal of the truck from a vacant lot. The government failed to prove that part of the corpus delicti indicating that the removal had been from one of the places named in the statute and that place alleged in the indictment, a certain street.

Though appellant was found present in the truck after the removal there could be no presumption as to his guilt on this basis for his presence was reasonably explained by the government's own evidence. The government introduced the exculpatory statement of appellant, failed to prove it to be false and was bound by it as a matter of law. There was no basis upon which the jury could reasonably find appellant guilty of the crime charged.

ARGUMENT

Point One

The Trial Court erred in overruling appellant's motion for a directed verdict at the close of the government's case on the ground of a variance between the allegation of the indictment and the proof offered by the government as to the place from which the vehicle was removed. (App. page 26)

At the trial below the government depended only upon the testimony of its witness Robert Owens to establish the fact that the vehicle had been removed from one of the places, the unauthorized removal from which constituted a violation of Title 22, Section 2204, District of Columbia Code (1940). The witness, Robert Owens testified on this point as follows; (App. page 20)

Q And are you buying that truck from the company?

A Yes.

Q Mr. Owens, let me ask you this; do you customarily take this truck home with you at night?

A Yes, ma'm, every night.

Q And where do you park it?

A On a little vacant lot where I live, up on that vacant lot on Third Street.

Q Now, directing your attention to December 7, 1945, did you take the truck home that night?

A Yes, I took that truck home that Friday night.

Q What did you do with it?

A I parked the truck and went across to the lunch room and drank a cup of coffee, and went in the house and went to bed.

Q You parked it in the lot?

A Yes, right on the street by the lot.

Q Do you know what time it was?

A It was after dark, before midnight.

As can be clearly seen from the foregoing testimony of Robert Owens, he testified that he customarily took the truck home with him every night and parked it on "a little vacant lot". "Every night", necessarily includes the night in question, December 7, 1945, especially since the witness was then speaking of this period. This alone is positive evidence of the fact that on the night of December 7, 1945, the truck was parked, "on a little vacant lot". To the direct question, "You parked it on the lot?", the witness answered, "YES," He then added, "right on the street by the lot." The witness did not answer, "NO" to this question as he might well have, if such had been the fact and if such had been his intention. The answers were given on direct examination and not on cross examination; it will be observed also that at this point the prosecutor interrogated by leading questions. On direct examination the government was bound to obtain a negative answer to its question, "You parked it on the lot?" Instead, the witness gave the definitely positive answer, "Yes,..." The witness did not negative the question. His was decidedly an affirmative answer.

There was no further evidence as to the place from which the truck was removed. The government, therefore, (1) established the fact that the vehicle was removed from a vacant lot, and (2) failed to show that the truck was removed from a certain street, as alleged in the indictment.

The general effect of the testimony of Robert Owens on this point can best be illustrated by the fact that upon appellant's motion for a directed verdict, the government's attorney conceded the fact that there had been a variance. (App. page 26) That Owens testified that the truck was parked on a vacant lot was never controverted by the government. The very best that could be said concerning the government's case on this point is that it may have created a very slight doubt as to exactly

where the truck was parked. An important and essential element of the government's case against appellant cannot be said to have been established beyond a reasonable doubt when in fact the government has shown a fact decidedly contrary to the fact which it sought to establish.

The government had upon it the burden of proving beyond a reasonable doubt that the truck was removed from "a certain street". Proof of a removal from any other place whatsoever was a material variance. The government undertook to sustain its burden only through the testimony of Robert Owens. Robert Owens gave what amounted to an affirmative answer to the government's question,"You parked it on the lot?" The witness had already testified that he parked the truck on a vacant lot, "every night". There was, therefore, a material variance between the allegation in the indictment and the proof offered by the government. The government was bound to show conclusively by substantial evidence that the vehicle was removed from a certain street.

> "Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of a fact to be proved and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when conclusion sought to be drawn from it is one of fact for the jury."
> National Labor Relations Board v. Falk 102 F 2nd. 383

> "To sustain a verdict there must be substantial testimony."
> United States v. McAlister 86 F 2nd. 379

If the truck had been removed from a street, as the indictment alleges, the government had it within its power to show that fact with at least some semblance of a degree of clarity, but to the contrary, the government's attorney was obviously convinced that the truck had in fact been removed from a vacant lot as is shown by the fact that the government's attorney asked its witness the very leading question, "You parked it on the lot?". Considering the whole of the testimony of Robert Owens, the only

conclusion possible is that on the night of December 7, 1945 the truck was parked, as usual, on a little vacant lot. From this vacant lot the truck was removed.

> "Evidence must be weighed according to the proof in the power of the parties to produce and contradict."
> Henderson v. Richardson 25 F. 2nd. 225

> "Facts must be found on evidence to support them, and suspicion, however, strong, cannot be substituted therefor."
> In Re Rivkin 216 F. 218

> "Conclusive evidence is that which is incontrovertible, that is to say, either not open or not able to be questioned, as, where it is said that a thing is conclusively proved, it means that such result follows from the facts shown as the only one possible; the term conclusive proof meaning either a presumption of law or evidence so strong as to overbear everything to the contrary."
> Thompson Lumber Co. v. Interstate Commerce Comm. 193 F.682

Proof showing a removal of a vehicle from a vacant lot constitutes a material variance from an allegation in the indictment alleging a removal from a certain street. To be guilty of a violation of Title 22, Section 2204 of the D.C. Code (1940) one must remove without authority a vehicle from one of the eleven places mentioned in the statute, the removal of a vehicle from which without authority, constitutes a crime. Although the government may allege a removal to have been from all eleven of the places to meet possible variances in proof, if the indictment alleges an unauthorized removal from one specific place mentioned in the statute (App. page 14) then the government must prove an unauthorized removal of a vehicle from that specific place. On this point, perhaps the leading case in this jurisdiction is District of Columbia v. Libbey 9 App. D.C. 321 wherein under a statute prohibiting unlawful occupation of United States owned parks parkways, lots, vacant spaces, etc., an information was brought charging defendant with unlawful occupation of a park owned by the United States. The proof showed that the defendant had un-

lawfully occupied a United States owned vacant space which in the future might be converted into a park. This Court held the variance fatal, even though occupation of a United States owned vacant space was a crime denounced by the same statute.

> "An information charging the unlawful occupation of a park or parking is not supported by evidence that the space occupied is not a park, but only a vacant space, liable at someday, at the will of the municipality to be converted into a park."
> District of Columbia v. Libbey 9 App. D.C. 321

In Williams v. United States 71 App. D.C. 377, 110 F. 2d 554 when an information had been brought charging defendant with inviting a person for purpose of prostitution in the District of Columbia and defendant convicted; it was shown that the statute under which the information was brought specified that invitations for purpose of prostitution, "in and upon any avenue, street, road, highway, open space, alley, public square, or inclosure in the District of Columbia", were unlawful; the information did not charge an invitation in or upon any one of the places specified in the statute. This Court held that the information charged no crime; that the defect could not be cured by verdict.

> "Where the criminality of an act depends on the place where it is committed, however, the allegation of place is material, and variance between the allegation and the proof is fatal."
> 31 Corpus Juris 841 par. 453

Appellant had a right to expect the government to confine its proof to an unauthorized removal of a vehicle from a certain street and to expect the government not to offer proof of an unauthorized removal from any one of the other ten places specified in the statute (App. page 14). It was not the duty of appellant to frame a defense for all of the eleven places from which a vehicle could be removed without authority and violate Title 22, Section 2204 of the D.C. Code (1940).

"By the familiar rules of pleading, a party charged with an offense is entitled to a statement in the indictment of the facts which constitute the offense; and if the offense may be committed in either of various modes, the party charged is entitled to have that mode stated in the indictment which is proved at the trial; when one mode is stated, and proof of the commission of the offense by a different mode is offered, such evidence is incompetent by reason of variance."
Commonwealth v. Richardson 126 Mass. 34, 30 Am.Rep. 847

This Court in Cromer v. United States 78 U.S.App.D.C.400, 142 F. 2d. 697, held that in a prosecution for a violation of the Harrison Narcotic Act where the indictment alleged a sale of a mixture containing 8,301 grains of a drug and the proof showed a sale of a mixture containing 58.5 grains of the drug, that the variance was not material, not prejudicial, and therefore harmless. The variance in the present case is not a harmless variance. The Cromer case is easily distinguished from the present case: (1) in the Cromer case the variance was one of quantity only; a variance of quantity seldom being material, while in nuisance and larceny-type cases, such as the present case, averrments of place are always material and must be proved as laid. Heitman v. U. S. 5 F. 2d. 887 (2) in the Cromer case the variance as to quantity was neither material nor misleading while in the present case the variance as to the place from which the vehicle was removed was both material and misleading; (3) Under the Narcotic statute in the Cromer case there were no separate, specified crimes for sales of various specified amounts of the drug; while, under Title 22, Section 2204 of the D.C. Code eleven separate crimes are defined depending on the place from which the vehicle is removed without authority; (4) in the Cromer case prejudice was not shown, in the present case appellant Epps was prejudiced in making his defense, and appellant Epps is further prejudiced in that he is again liable to be put in jeopardy for commission of the same offense, the present conviction affording no protection against another indictment charging an unauthorized removal of the same truck from a vacant lot.

Point Two

The Trial Court erred in its refusal to direct a verdict for appellant on his motion at the close of all the evidence, (App. page 35) on the ground of a material and prejudicial variance between the allegation of the indictment and the proof offered by the government as to the place from which the truck was removed.

The statute under which the indictment was brought, Title 22, Section 2204, District of Columbia Code (1940) (App. page 14) denounces as being a crime the unauthorized removal of motor vehicle and the operation or driving of the same for one's own profit, use or purpose from (1) a garage, (2) stable, (3) or other building, (4) or from any place or locality on a public or private highway, (5) park, (6) parkway, (7) street, (8) lot, (9) field, (10) inclosure, or, (11) space.

The statute covers unauthorized removals from eleven specified places. A criminal statute must be most strictly construed. An unauthorized removal of a vehicle, to be a crime under the statute, must be a removal from one of the eleven places set forth in the statute. For an instance, an unauthorized removal of a vehicle from one raft on a stream to another would not be a crime under this statute. The indictment states no crime at common law.

It was incumbent upon the government to prove that appellant removed the vehicle in question from (1) one of the eleven places set forth in the statute, the removal from which without authority constitutes crime, and (2) from the one of such places alleged in the indictment. The indictment did allege an unauthorized removal of a vehicle from one of the eleven places set forth in the statute, "a certain street". However, the government failed to prove an unauthorized removal of the vehicle from, "a certain street", as alleged in the indictment. The

government did prove a removal from a vacant lot. The witness, Robert Owens was called by the government a second time as a rebuttal witness after the question of variance had been raised by appellant. (App. page 35) The government thus had an opportunity to clearly show where the vehicle was parked but did not do so.

In Fleisher v. United States 302 U.S. 218, the indictment alleged that during a certain period defendant unlawfully conspired to possess and did possess and did cause to be possessed certain stills and apparatus for the production of distilled spirits without having the same registered with the "Collector of Internal Revenue" as required by law. A conviction was had. On appeal, the government conceded that the charge should have been that there had been a failure to register the said stills and apparatus with the "District Supervisor of the Alcohol Tax Unit in the Bureau of Internal Revenue." The Supreme Court reversed the conviction and held that the indictment failed to state a crime against the United States; that a conviction had thereunder was void.

It is the right of defendant to be, "(1) definitely informed as to the charge against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial, and, (2) that he may be protected against another prosecution for the same offense." Berger v. U.S. 295 U.S. 78.

Appellant could not have been said to have been, "definitely informed" as to the nature of the accusation against him when the indictment charged a removal of a certain vehicle from a certain street when at the trial he was confronted by evidence of a removal of a vehicle from a certain vacant lot. The right given to appellant by virtue of Article VI. of the Amendments to the Constitution of the United States to be informed of the nature of the accusation against him was thus violated.

Appellant, being surprised by evidence of a removal of a vehicle from a vacant lot, was greatly prejudiced in that he was not properly prepared to meet the evidence offered by the government. Appellant could not have possibly prepared his defense to meet proof of an unauthorized removal from all of the eleven places specified in the statute. Nor was it his duty to do so. It was the right of appellant to rely on the allegations in the indictment. It was not a duty of appellant to foresee a possible variance. Appellant was misled.

> "The test of materiality of 'variance' in an information is whether the pleading so fully and correctly informs a defendant of the offense with which he is charged, that taking into account the proof which is introduced against him, he is not misled in making his defense."
> People v. Guerrero 137 P 2nd 21, 22 Cal. 2d.453

In Berger v. United States 295 U.S. 78, the Supreme Court said:

> "In Washington and G. R. Co. v. Hickey 166 U.S. 521 this court said that, "No variance ought ever to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled defendant at the trial." This was said in a civil case, it is true, but it applies equally to a criminal case if there be added the further requisite that the variance be not such as to deprive accused of his right to be protected against another prosecution for the same offense."*

Appellant, convicted of an unauthorized removal of a vehicle from a street with evidence of an unauthorized removal of a vehicle from a vacant lot may again be tried for the same unauthorized removal of the same vehicle. Title 22, Section 2204 District of Columbia Code (1940 sets forth as being crimes, unauthorized removals of vehicles from eleven designated places. An unauthorized removal of a vehicle from any one of the eleven places mentioned in the statute (App. page 14) constitutes a separate and distinct crime. Provided that the remover's possession be not continuous, the remover may be indicted for unauthorized removals of the same vehicle on the same day from several or all of the places mentioned in the statute. Appellant may be again

* Note: Underscoring by briefwriter

be indicted, tried and convicted of this very same unauthorized removal of a vehicle from a vacant lot under the statute.

Evidence required to prove an unauthorized removal of a vehicle from a vacant lot is not the same as evidence required to prove an unauthorized removal of a vehicle from a street, and that is true even though the same vehicle be involved and even though the alleged unauthorized removals occurred on the same day.

In order to successfully plead former jeopardy, the pleader must be prepared to show that the same, the identical evidence would sustain both the first and second indictments. This Court, following the Supreme Court in Morgan v. Devine 237 U.S. 637, has stated the applicable law as follows:

> "The test of identity of offenses within the 'double jeopardy' clause of the Fifth Amendment* and, if not, the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by statute."
> District of Columbia v. Buckley 75 U.S.App. D.C. 301, 128 F. 2d 28.
> * is whether the same evidence is required to sustain them

In that case, D. C. v. Buckley, supra, this Court held that although both charges grew out of one and the same transaction they were not the same in point of law and therefore a plea of former jeopardy was not good as to the second charge brought some time after disposal of the first charge. In overruling the opinion of the Police Court Judge below this Court said further,

> "The opinion of Judge Newman urges that where statutory definition of offenses is such that more than one may grow out of the same transaction, it is oppressive for the prosecution to file several charges successively, either that all should be filed and disposed of at one time, or the prosecution limited to the first it selects and presses to conviction. But the definition of offenses is for the legislative authority, and the determination of whether and when to prosecute for more than one growing out of the same transaction is a matter of policy for the prosecuting officer and not for determination by the courts."
> D.C. v. Buckley, supra

Evidence of an unauthorized removal of a vehicle from a vacant lot was not properly admissible at the trial of appellant below. However, the fact that such evidence was admitted would avail appellant nought on a plea of former jeopardy to a second indictment charging appellant with an unauthorized removal of the same vehicle from a vacant lot. The record will show merely that appellant was convicted of an unauthorized removal of a vehicle from a certain street.

> "In determining issue presented by a plea of former jeopardy, it is immaterial that evidence relied on to support the second charge was in fact introduced on trial of the first, and the criterion is not what evidence was introduced, but what might have been, and the determinative feature is whether the facts alleged in the one charge would support a conviction under the other."
> Mikell v. State 5 So. 2nd 825, 242 Ala. 298

Appellant should not be compelled to risk a plea of former jeopardy to a second indictment charging appellant with the unauthorized removal of the same vehicle on the same day from a vacant lot while he has already been convicted of the same unauthorized removal from a vacant lot under an indictment charging an unauthorized removal from a certain street, with proof not sustaining that charge but tending to show an unauthorized removal from a vacant lot. Whether or not it is probable that the government would bring a second indictment against appellant charging an unauthorized removal from a vacant lot is not the question to be decided, but, if it is possible for the government to again indict appellant, even though highly improbable, then the conviction should be set aside.

> "If the facts which would convict on a second prosecution would not necessarily have sustained a conviction on the former prosecution for the crime there charged, the first prosecution would not stand as a bar to the second, although the offenses charged might have been committed in the same transaction."
> State v. Bowen 18 So. 2nd. 478, 181 La. 442

It does not appear on the face of the record in this case that appellant was convicted of the unauthorized removal of a vehicle from a vacant lot, it does appear on the face of the record that appellant was convicted of an unauthorized removal of a vehicle from a certain street. The evidence adduced by the government in support of the charge of an unauthorized removal of a vehicle from a certain street does not appear on the face of the record. Appellant could not plead his conviction in this case in bar to a second indictment alleging an unauthorized removal of the same vehicle, on the same day from a vacant lot. Facts outside the record and inconsistent with the record cannot be urged on a plea of former jeopardy. Clawans v. Rives 70 App. D.C. 107, 104 F 2nd. 240.

The allegation in the indictment, "from a certain street" was not an allegation of venue but it was a substantive allegation of the crime under the statute, without which allegation the indictment would have stated no crime, since the indictment does not state any crime known to the common law. It was, therefore, incumbent upon the government to prove that allegation as laid. This case is a larceny-type case. In Heitman v. United States 5 F. 2nd 887, the court held that where the indictment alleged that alcohol was being possessed and an alcohol nuisance was being created at, "590 Hampshire Street", an address four blocks away from that charged in the indictment, in the same town, that the variance was material, prejudicial, misleading, and hence fatal. The court held further, that in nuisance and larceny-type cases, place is material and, "Where place is a necessary part of the description of the offense, it must be proved as laid." Heitman v. United States supra.

Without mention of one of the eleven places set forth in Title 22, Section 2204 District of Columbia Code (1940), the unauthorized removal from which constitutes a crime under the statute, the indictment would have charged no crime whatsoever. Williams v. United States supra. It is clear, therefore that the allegation, "from a certain street" was material. If the indictment under this statute alleges an unauthorized removal of a vehicle from one of the eleven places mentioned in the statute and the proof shows an unauthorized removal of a vehicle from another one of the ten other places mentioned in the statute it constitutes a material variance. Commonwealth v. Richardson, supra.

It is obvious that under Title 22, Section 2204 of the D.C.Code the place from which the vehicle is removed without authority is a most material allegation, going to the substance of the crime.

Appellant was prejudiced by the aforesaid material variance in the making of his defense as aforesaid; appellant is further prejudiced in that he is liable to again be placed in jeopardy for the same offense.

Point Three

The Trial Court committed error in submitting to the jury the question as to the place from which the vehicle was removed, used or operated when there was not sufficient evidence upon which to warrant a submission of the question to the jury.

Most simply put, in the present case, the corpus delicti consisted of the following: (1) a vehicle owned by another, (2) a removal, use, or operation of said vehicle from a street by one other than the owner, (3) non-consent of the owner of the vehicle to such use, operation or removal.

An unauthorized removal of the vehicle from a street, being part of the corpus delicti, must be proved beyond a reasonable doubt to warrant a conviction. A main fact which should have been shown by conclusive evidence as part of the corpus delicti in this case was that the vehicle had been removed from a certain street. This was imperative since the crime was one against a statute and the statute, Title 22, Section 2204 of the District of Columbia Code (1940) denounces the unauthorized removal of vehicles from certain designated places in the District as being crimes; and since, further, the indictment alleged an unauthorized removal of a certain vehicle from, "a certain street."

There was no clear, convincing proof of a removal of the vehicle from a street. There was proof of a removal of the vehicle from a certain vacant lot. The proof was not such as would warrant the submission of the question to the jury. The government, at the trial below established the fact that the truck had in fact been left parked on a vacant lot. (App. page 20) Although there is perhaps a mere scintilla of evidence as to a parking elsewhere than on a vacant lot, there was certainly no clear and convincing proof that the truck in question had been left parked on a certain street. The facts which form the basis

of the corpus delicti must be proved by either direct or presumptive evidence of the most cogent and irresistible kind; conviction cannot be sustained unless the corpus delicti is clearly established. Saunders v. State 167 Ala. 85, 52 S. 417

To find appellant guilty, it was necessary that the jury draw an inference from the fact that the truck was left parked in the place charged in the indictment as being the place from which it was removed, "a certain street". When this first fact was not shown by the government, the Court was not justified in giving the question to the jury to draw inferences therefrom in order to arrive at their verdict when as a matter of law the fact had not been established.

> "The question whether one fact can be inferred from another is a question of law and to be decided by the court."
> United States v. Stockwell 4 Cranch. (4 D.C.) 671

This Court said in Sleight v. United States 65 App. D.C. 203, 82 F. 2d 459, concerning this question as follows:

> "Counsel for the government in their brief lay great stress upon the right of jury to draw inferences and deductions from the evidence; but inferences and deductions which the jury may be permitted to draw must be based upon some substantial evidence tending to establish the guilt of defendant. Otherwise to permit the jury to convict upon inferences and deductions would merely mean to permit the jury to speculate as to the guilt of defendant. This sort of procedure the courts uniformly condemn."
> Sleight v. U. S., supra.

Appellant submits, therefore, that it was prejudicial error for the Court to submit to the jury the question as to the place from which the vehicle had been removed when there was not sufficient evidence upon which the jury could reasonably find as a fact that the vehicle had been removed from a street as alleged, when, indeed, there was sufficient evidence upon which the jury could have found as a fact that the vehicle had been left parked on a vacant lot. The whole case of the government hinged upon establishing this one fact; the government failed to prove the fact, it was error to submit the question to the jury.

Point Four

The Verdict Was Contrary TonThe Evidence.

At the trial below the government established:

(1) That a motor truck had been left parked on a certain vacant lot. (App. page 20)

(2) That the day following the so leaving of the truck, appellant was found sitting in the truck at a point removed from the place of leaving.

(3) That appellant, on being found sitting in the truck, gave to the government's witness, Officer Winters, a very reasonable explanation of his presence in the truck. Officer Winters so testified on behalf of the government, (App. page 25) that appellant told the witness that appellant had a few minutes before attended a near-by movie theater; that appellant knew the driver of the truck; that on seeing the truck parked he reasoned that the driver would be near and that appellant decided to wait for the driver, which he did; that he had not removed the truck, had not operated it and had not moved it; that he came upon the truck parked at the same spot where the officer found him.

The indictment charged an unauthorized removal of the truck from a street. Appellant was not being charged with an unauthorized removal of the truck from a vacant lot, as the evidence tends to show that the truck was removed from a vacant lot. The evidence did not disclose who removed the said truck except by attempted inferences drawn from the established fact that appellant was found sitting in the truck. However, to give rise to any presumption as to guilt when found in possession of recently stolen property, one must fail to give a reasonable explanation of his possession. The defendant has a right to rely upon any facts favorable to him developed in the government's case against him.

The government undertook to prove by direct evidence, one main fact, that the truck had been left parked on a street, such that the inference might be drawn from that fact that the truck had been removed from the street. The government failed to prove this fact. Having failed to prove this first main fact, upon which was based the entire circumstantial case against appellant, the entire case must fail and fall because of the fact that the government did not prove that the truck was parked on a street. The truck could not have been removed from a certain street as alleged in the indictment.

> "In short, the case pleaded was not proved and the case proved was not pleaded."
> St. Louis, San Francisco & Tex. R. Co. v. Seale
> 229 U.S. 156 at page 161

> "Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not themselves be presumed."
> Manning v. Ins. Co. 100 U.S. 693

> Weaver v. B. & O. R. Co. 3 App. D.C. 436

Such evidence as the government did introduce to establish the fact that the truck had been removed from any place whatsoever was obtained by interrogating its witness Robert Owens by leading questions (App.page 20) If the truck had in fact been left parked on a street as alleged in the indictment, then the government had it within its power to show that fact clearly. Since the government set out to build up around that one fact, sought to be proved by direct evidence, its entire case against appellant by circumstantial evidence, it was imperative that the government establish that the truck was left parked on a street. This the government failed to do. Where it is apparent that a party has the power to produce evidence of a more explicit, direct, and satisfactory character than that which it does introduce and relies on, it may be presumed that if the more satisfactory evidence had been given it would have been detrimental to him and would have laid open deficiencies in, and objections

to, his case which the more obscure and uncertain evidence did not disclose.

Clifton v. United States 4 How. 247

Chesapeake Beach R. Co. v. Broz 39 App. D.C. 58

Graves v. United States 150 U.S. 118

We submit that the government failed to prove the corpus delicti and having thus failed, it could not establish its case to warrant a finding of guilt by the jury.

It is a fundamental cannon of proof that, where weaker and less satisfactory evidence is offered when stronger and more satisfactory evidence is within the power of the party, the evidence offered should be viewed with distrust.

Michalsky v. Cont. Brewing Co. 48 Mont. 1, 134 P 307

This Court said in Williams v. United States 78 U.S.App. D.C. 322, 140 F. 2nd 351, "To sustain it (the Conviction) we would have to find at least that the evidence is more consistent with guilt than with innocence." Warner v. United States, 10 Cir. 60 F. 2d 700. To warrant a conviction, every element of the offense must be established.

The government, through its witness, Officer Winter, introduced the statement of appellant explaining his presence in the truck. (App. page 25). The explanation was a most satisfactory one. The government, thereafter, failed to show that this exculpatory statement of appellant, introduced by the government, was false. In the absence of any evidence showing the falsity of such an exculpatory statement, the party introducing it is bound thereby as a matter of law. It is not a question of appellant introducing the exculpatory statement on his own behalf, for then the jury might be warranted in passing upon the credibility of the witness and excluding the statement from consideration; it is however, a question of the government introducing the exculpatory statement and thereafter failing to show that the

exculpatory statement was in fact, false. Having introduced the exculpatory statement of appellant, and having failed to show that it was false, the government was, as a matter of law, bound by the statement of appellant to the effect that he had not removed the truck; that he sat in the truck waiting for its driver whom he knew and reasoned that the driver would be near; that he found the truck parked a short distance away from a movie theater that a few minutes before he had come out of having attended a movie; that he did not move or attempt to move the truck; that he had been in the truck only a few minutes when approached by the officer. (App. page 25)

State v. Kavanaugh 133 Mo. 452, 33 S.W. 33, 34 S.W. 842

Turner v. State 176 S.W. 2d 327, 146 Tex. Crim. Rep.474

"Where recently stolen property was found in accused's possession and the state introduced and relied upon a statement by accused which reasonably explained his possession, the burden was upon the state to show that such exculpatory evidence was false."

State v. Darrah 92 P. 2d 143 60 Idaho 479

See also:

Cartello v. United States 93 F. 2d 412

Young v. United States 97 F. 2d 200

We submit, therefore, that the government failed in its proof completely in that: (1) the first link in the circumstantial chain---that the truck had been left parked on the street---was not shown, (2) the last link in the circumstantial chain---that the appellant was found in the truck without a reasonable explanation of his presence therein was not shown due to the fact that the government, having introduced the exculpatory statement of the appellant reasonably explaining his presence in the truck, was bound thereby as a matter of law since the government failed to show that the statement was in fact false. As a matter of law,

therefore, the last link in the government's circumstantial chain failed because of the fact that the presence of appellant in the truck was reasonably explained by an exculpatory statement of appellant which was introduced and relied on by the government and not shown to be false.

The first and the last links in the government's circumstantial chain not being proved as aforesaid, as a matter of law, the evidence adduced by the government cannot support a finding of guilt by the jury.

C O N C L U S I O N

Counsel for appellant, in conclusion, respectfully urge, therefore, that this Court reverse the verdict and judgment entered thereon against appellant by the Court below.

Respectfully Submitted,

De Long Harris

Harvey L. Hughes

Attorneys for Appellant

Service of the foregoing appellant's brief acknowledged this _____ day of April, 1946.

_____
Assistant United States Attorney